IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR

::::

O R D E R

Jai Singh Bhati
Vs.
State of Rajasthan & Ors.

S.B. CIVIL WRIT PETITION NO.5839/2003 UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA.

DATE OF ORDER :: 21st August, 2006

PRESENT

REPORTABLE

HON'BLE SHRI JUSTICE MOHAMMAD RAFIQ

Mr.Harish Purohit, for the petitioner.
Mr.Rameshwar Lal Dave, Dy. Govt. Advocate for respondents.

BY THE COURT

In this writ petition, the petitioner has payed for a writ of mandamus directing the respondents to fix his pay at Rs.1255/- from the date of his initial appointment by adding the amount of pension received by him as Ex Defence Personnel to the

minimum of the pay in the scale of Rs.880-1680.

The petitioner has asserted that he is an Ex Defence Personnel. He was appointed on the post of Lower Division Clerk (LDC) in the Public Health and Engineering Department vide an order dated 25.08.1987 against the vacancies reserved for Ex-Defence Personnels. On appointment, fixation of his pay was made in the scale of Rs.880-1680. In doing so, however, respondents have not applied and complied with Rule 351 of the Rajasthan Service Rules, 1951 (for short 'RSR'). According to this Rule, the petitioner was entitled to be fixed at the stage which comes on adding minimum of the pay scale with the pension received by him being a retired Defence Personnel. His case was recommended by Assistant Engineer to the Executive Engineer vide letter dated 29.01.1991. Shri L.P.R. Mehta, Senior State Vice President of Rajasthan Public Health & Engineering Department Karmachari Sangh also agitated the cause of the petitioner by submitting a representation dated 23.04.1991 to the Superintending Engineer, PHED, Pali Circle, Pali but no action was taken thereupon. It has been further stated that petitioner himself submitted various representations to the respondents on 09.05.1991, 12.12.1991, 27.12.1991 and 07.01.1992. None of these representations however could to evoke any response except that the Assistant Engineer again vide his communication

dated 10.02.1992 recommended the case of the petitioner to the Chief Engineer, PHED, Jodhpur. The Additional Chief Engineer (H.Qrs.) thereafter by his letter dated 22.08.1992 informed the Assistant Engineer, PHED City Sub-Division, Pali that fixation of the petitioner cannot be made in the pay scale concerned by adding the pension received by him as the amount of pension he was getting was less than Rs.200/-. The petitioner immediately on 02.09.1992 again submitted a representation stating therein that firstly there was no such limit prescribed by Rule 351, he pointed out that infact the amount of pension which he was receiving as pension was Rs.375/- per month which was much more than Rs.200/-. The case of the petitioner was again forwarded to the Chief Engineer, PHED by the Superintending Engineer, PHED, Pali Circle, Pali where from all the documents relating to the petitioner's pay scale were again forwarded for necessary action by his letter dated 04.12.1992 and the Superintending Engineer again by his letter dated 12.01.1993 forwarded all the requisite documents as demanded. The Executive Engineer-cum-Technical Assistant to the Additional Chief Engineer (HQ) Jaipur vide his communication dated 12.05.1998 informed the Superintending Engineer, Pali that the petitioner could not be treated as re-employed person for the reason that he retired from service prior to attaining the age of 55 years. When petitioner came to know about this, he again

clarified to the concerned authorities by his representation dated 01.09.1998 that appointment of the petitioner was made against the quota of Ex Army Personnel which would come within the purview of employment. In so far as those who retired from army after attaining the age of 55 years are concerned, their appointment under the Government is described as re-employment. That even though the age of petitioner when he retired from Army was 37 years but there was no such condition in Rule 351 which debar fixation of his pay scale by adding the amount of pension to the minimum of pay scale of Rs.880-1680. When still no action was taken by the respondents, the petitioner served legal notice of demand of justice on them through his advocate.

The Additional Chief Engineer (Rural) PHED, Jaipur by communication dated 26.04.2003 addressed to Chief Engineer, PHED, Jodhpur conveyed that since no recommendation was made by the Appointing Authority of the petitioner, therefore, in view of the Rule 19 of the Rajasthan Civil Service (Absorption of Ex-Service Personnel) Rules, 1959, the petitioner was not entitled to higher pay scale. The petitioner having attained the age of superannuation, retired from service on 31.07.2003 and thereafter filed the present writ petition on 07th August, 2003 with the prayer as aforementioned.

The respondents have contested the petition and filed reply thereto. In the reply, it has been stated that the petitioner retired from Army services prior to attaining the age of 55 years, therefore, the amount of pension received by him could not be added to minimum of the pay scale of Rs.800-1680 while making his pay fixation. It has also been reiterated that since there was no recommendation made by the appointing authority when the petitioner was appointed, he was not entitled to higher pay scale in view of the Rule 19 of the Rajasthan Civil Service (Absorption of Ex-Service Personnel) Rules, 1959.

I have heard learned counsel for the parties and perused the record.

It is curious to note that the respondents in the present case in refusing to make pay fixation of the petitioner under Rule 351 have been taking different stand from one stage to another. For all this period, petitioner had been struggling to convince them his case was covered by Rule 351 of RSR, the respondents have been refusing to accept his prayer citing one or the other reasons at different stages which are as follows:-

1. The Additional Chief Engineer by communication dated 22.08.1992 addressed to Assistant Engineer, PHED City

Sub-Division, Pali stated that pay fixation of the petitioner cannot be made under Rule 351 because he was getting a monthly pension of Rs.178/- which was less than the requisite amount of Rs.200/-.

2. When the petitioner by his communication dated 02.09.1992 pointed out that besides there being no such minimum limit of Rs.200/-, he infact was getting the amount of Rs.375/- per month as pension, his case was again processed through various levels and ultimately Executive Engineer-cum-Technical Assistant to the Additional Chief Engineer (H.Q.) by letter dated 12th May, 1998 conveyed to Superintending Engineer, PHED, Pali that petitioner could not be treated as re-employed Personnel for the reason that he retired from service prior to attaining the age of 55 years and, therefore, his pension could not be fixed by adding the minimum of the pay scale of Rs.880-1680/-.

3. When the petitioner again represented and served notice for demand of justice through his lawyer, the Additional Chief Engineer (Rural) PHED, Jaipur came out with a third reason for not invoking Rule 351 in the case of petitioner by stating that no such recommendation was made by the appointing authority while giving appointment to the petitioner as required by Rule 19 of the Rajasthan Civil

Service (Absorption of Ex-Service Personnel) Rules, 1959.

In order to appreciate the true content and meaning of Rule 351 of RSR, it is best to extract the said Rule for the facility of reference hereinbelow :-

> "351 (a) When a person formerly in military service obtains employment in the Civil Department after having been granted a military pension he shall continue to draw his military pension, but the authority competent to fix the pay and allowances of the post in which he is employed shall have in fixing his pay and allowances in the post in which he is re-employed, the power to take into account the amount of pension, including such portion of it as may have been commuted.
>
> (b) A military officer, departmental officer warrant or non-commissioned officer or soldier who is granted a pension under military rules while he is in civil employ, shall draw such pension while he in civil employ, but the authority competent to fix the pay and allowances of the post in civil employ, may, with effect from the date from which the pension is granted, reduce such pay and allowances with reference to such officer or soldier by any amount not exceeding the amount of such pension."

Rule 351 clearly provides that when a person formerly in military service obtains employment in the Civil Department after having been granted a military pension he shall continue to draw his military pension, but the authority competent

competent to fix the pay and allowances of the post on which he is employed shall have in fixing his pay and allowances on such post the power to take into account the amount of pension, including such portion of it as may have been commuted. Sub-rule (b) of Rule 351 grants liberty to such person to draw the amount of military pension while he in civil employment, but the authority competent to fix the pay and allowances of the post in civil employment, may, with effect from the date from which the pension is granted, reduce such pay and allowances with reference to such officer or soldier by any amount not exceeding the amount of such pension. It would thus be clear that the only requirement of the Rule is that in order to get the pay fixed at the time of re-employment in the civil department, a person formerly in military service should have been granted pension. Neither this Rule envisage that element of pension should be taken into account while making pay fixation only if the concerned person retired from army on attaining the age of 55 years nor the Rules require that amount of pension should in every case exceed Rs.200/-. In making pay fixation, Sub-rule (b) of Rule 351 clearly provides that the authority competent to fix the pay and allowances on the post of civil employment may with effect from the date from which the pension is granted to the officer of the army in receipt of military pension, may reduce such pay and allowances by an amount not exceeding the

amount of such pension. This rule has been so devised to ensure that while making the pay fixation of the officer in receipt of military pension, the amount of such pension shall be taken into consideration but at the same time while fixing the pay and allowances for the post of civil employ, the ultimate amount would be liable to be reduced by any amount not exceeding the amount of such pension.

Sub-clause (b) of Rule 351 therefore has given a definite limit of such amount by which the pay so fixed would be liable to be reduced and according to this, such amount cannot exceed the amount of total pension. The authorities have thus been invested with the power to decide even a lesser amount, the amount of pension actually received which may be reduced while making the pay fixation in accordance with Rule 351 of the RSR. In exercise of such powers, the Government issued notification NO.F.1(80) FD (Exp. Rules) 65 dated 08.04.1968 which was latter revised by notification NO.F.D. Notification No.F. 1(9) FD/Gr.2/77 dated 26.05.1978. These notifications have been incorporated as notes below Rule 351 in the RSR.

Clause 1 and 2 of these notifications are relevant for the purpose of deciding the present controversy which read as under:-

> "1 In the case of persons who have retired or who retired from military service before attaining the age of 55 and are re-employed, pension to the extent indicated below shall be ignored in fixing their pay on re-employment:-
>
> (i) in the case of pension not exceeding [Rs.200/-] per mensem, the actual pension,
> (ii) in other cases, the first [Rs.200/-] of the pension.
>
> No amount of pension shall be ignored in fixing the pay of a re-employed pensioner who retires after attaining the age of 55.
>
> 2. The pay of persons who are on re-employment on 08.04.1968 may be re-fixed on the basis of Note 2 with effect from this date provided they exercise an option in writing for such re-fixation within a period of six months therefrom. In the event of such re-fixation their terms should be determined afresh as if they have been re-employed from the said date. The option, once exercised shall be final."

The aforesaid clause 1 has provided that in case of persons who have retired or who retired from military service before attaining the age of 55 and are re-employed, in case their pension does not exceed Rs.200/- the amount of actual pension shall be liable to be ignored in fixing their pay on re-employment and in other case where the amount of actual pension exceeds Rs.200/-, the first amount of Rs.200/- would be liable to be ignored. It was thus evident that when the respondents initially conveyed to the petitioner that the amount of pension is less than Rs.200/- and, therefore, his pay could not be fixed

according to Rule 351 and subsequently again when they conveyed to him that since he retired prior to attaining the age of 55 years, therefore, his pension could not be fixed under Rule 351 of RSR, on both the occasions, it was nothing but misconstruction of the aforesaid notification issued by the Finance Department.

According to Rule 351 (b) of RSR, the competent authority has to fix pay and allowances of the post of civil employment of the petitioner by reducing reduce such pay and allowances by an amount of Rs.200/- according to the aforesaid notifications of the Finance Department and that should be done with effect from the date which the pension was granted to him in order to arrive at the amount of his pay fixation on the date of his initial appointment. The re-employed pensioners who retired after attaining the age of 55 years would certainly be in a better position because in their case no amount of pension would be liable to be ignored in fixing the pay as indicated in afore-quoted notifications.

Rule 19 of the Rules of 1959 relied upon by the learned counsel for the respondents cannot afford any valid basis to refuse pay fixation of the petitioner under Rule 351 of RSR. Rule 19 (supra) simply provides that initial salary to be allowed to re-

employed army personnel shall be fixed ad hoc by the Government on the recommendation of the Selection Board. This is only intended to ensure that before making any fixation finally, the initial pay fixation would be made on ad hoc basis as per the recommendation of the Selection Board. However, any ad hoc pay fixation for that matter has to be replaced by a substantive or permanent pay fixation which in the present case could have been done only by following the procedure contained in Rule 351 of RSR.

As a result of the aforesaid discussion, the present writ petition is allowed and the respondents are directed to undertake the exercise on pay fixation of the petitioner as per the Rule 351 read with Finance Department Notifications referred to above within a period of three months from the date of receipt of this judgment and pay to him all arrears alongwith interest @ 6% per annum with the said period.

[MOHAMMAD RAFIQ],J.

Ashwini/-